No. 13673

In the United States Court of Appeals for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO) and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 8,

Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellant,

vs.

MARTIN E. ADEN, et al.,

Appellees.

On Appeal from the United States District Court for the District of Oregon

---

Brief for Appellant Hawaiian Pineapple Company, Ltd.

KRAUSE & EVANS
GUNTHER F. KRAUSE
DENNIS LINDSAY
GERALD H. ROBINSON
916 Portland Trust Building
Portland 4, Oregon
Attorneys for Appellant
Hawaiian Pineapple Company, Ltd.

GLASS-KEYSTONE PRESS

SUBJECT INDEX

SUBJECT INDEX—(Continued)

TABLE OF AUTHORITIES
CASES

CASES—(Continued)

STATUTES

MISCELLANEOUS

No. 13673

In the United States Court of Appeals for the Ninth Circuit

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION (CIO) and INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 8,

Appellants,

vs.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellee.

HAWAIIAN PINEAPPLE COMPANY, LTD., a corporation,

Appellant,

vs.

MARTIN E. ADEN, et al.,

Appellees.

On Appeal from the United States District Court for the District of Oregon

---

Brief for Appellant Hawaiian Pineapple Company, Ltd.

JURISDICTIONAL STATEMENT

This is an appeal from that part of a judgment of the District Court for the District of Oregon entered on July 31, 1951, upon a jury verdict, against the plaintiff-appellant Hawaiian Pineapple Company, Ltd. (hereinafter referred to as "Hapco") and in favor of 99 individual defendants-

appellees (Tr. 137-141) and from an order, entered September 8, 1952, by said District Court denying Hapco's motion for a partial new trial (Tr. 148-149).

The jurisdiction of this Court over the appeal rests upon 28 U.S.C.A., Sec. 1291, by reason of a notice of appeal, filed October 7, 1952 (Tr. 178-179).

The jurisdiction of the District Court rests upon Sec. 303 of the Labor-Management Relations Act, 1947 (hereinafter referred to as the "Act"), 61 Stat. 158, 29 U.S.C.A.

(Supp. 1952), Sec. 187[1], and upon 28 U.S.C.A., Sec. 1332 (Diversity of Citizenship).

Such jurisdiction stems from admissions and contentions in the Pre-Trial Order entered by the District Court and from proof adduced at the trial:

(1) That admittedly Hapco is a Hawaiian corpora-

---

[1] Sec. 303 provides in part:

"(a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is—

(1) forcing or requiring any employer or other self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; . . .

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) [of this section] may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

tion growing and shipping pineapple to the United States mainland and to foreign countries for sale (Tr. 50).

(2) That admittedly the defendant International Longshoremen's & Warehousemen's Union (CIO) (hereinafter referred to as "International") is a "labor organization"[2] composed of affiliated local unions (Tr. 50-51) and the defendant International Longshoremen's & Warehousemen's Union (Local 8) (hereinafter referred to as "Local 8") is a labor organization composed of individual members doing longshore and dock work in certain ports of the State of Oregon and the Columbia River.

(3) That admittedly Hapco is engaged in Interstate

---

[2] Sec. 501 (3) of the Act provides, in part, that the term "labor organization" shall have the same meaning as when used in the National Labor Relations Act, as amended, in Sec. 2 (5) of which a "labor organization" is defined as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (29 U.S.C.A. (Supp. 1952), Sec. 152(5)).

Commerce and the present action involves an "industry or activity affecting commerce"[3] (Tr. 50, 157, 1050).

(4) That allegedly the defendants International and Local 8 engaged in various activities in violation of Sec. 303 (a) (1) of the Act and that Hapco was thereby injured in its business and property (Tr. 57-63).

(5) That admittedly at the commencement of the action Hapco was a citizen of Hawaii and the individual appellees were citizens and residents of states or territories of the United States other than Hawaii, and that the amount in controversy exceeds the sum of $3,000.00 exclusive of interest and costs (Tr. 50, 51-52).

---

[3] The term "industry affecting commerce" is defined in Sec. 501 (1) of the Act to mean "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or the free flow of commerce." The term "commerce" is defined by Sec. 2 (6) of the National Labor Relations Act, as amended, to mean "trade, traffic, commerce, transportation or communication, among the several states, or between . . . any Territory of the United States and any State . . ." (29 U.S.C.A. (Supp. 1952), Sec. 152 (6)).

STATEMENT OF THE CASE, PRESENTING QUESTIONS INVOLVED

This appeal arises from an action brought by Hapco to recover damages for injuries to its business and property allegedly sustained by reason of the activities of International, Local 8 and 99 individual appellees in boycotting and preventing the delivery of a cargo of pineapple which Hapco was shipping from Honolulu, Territory of Hawaii, to processors of fresh fruit in California (Nature of Proceedings, Pre-Trial Order, Tr. 54).

The action was based on the ground that the defendants engaged in various specified activities, pursuant to a conspiracy, which constituted a violation of Sec. 303 (a) (1) of the Act by the defendant labor organizations, and were tortious acts under the common law[4] (Tr. 57-61).

The action was tried before a jury who returned a verdict of $201,274.27 in favor of Hapco and against International and Local 8. The jury, however, returned a verdit in favor of the individual appellees (Tr. 136).

In instructing the jury, the District Court refused Hapco's request to submit the issue—raised by the Pre-

---

[4] The activities of the defendant labor organizations were also alleged in the Pre-Trial Order to be in violation of Sec. 303 (a) (4) of the Act, but this charge was not submitted to the jury (Tr. 57-58).

Trial Order and supported by the proof—of the common law liability of the individual appellees as a result of their activities, separate and apart from any question of their liability as co-conspirators with International and Local 8. Instead, the District Court over Hapco's objection instructed the jury that, if neither International nor Local 8 was found liable, a verdict should be entered in favor of all the individual appellees; that only if one or both of the defendant labor organizations were found liable could the jury consider the liability of the individual defendants; and that an individual appellee could be liable only if he was a member of the conspiracy between the defendant labor organizations and the individual appellees or did any act in furtherance of such a conspiracy knowing of the common design and with the purpose of aiding and abetting it (Tr. 1435-1440).

After the jury returned its verdict in favor of the individual appellees, Hapco thereafter duly moved for a partial new trial on the sole issue of the common law liability of the individual appellees, or any of them, to Hapco as a result of their unlawful activities and to set aside the verdict and judgment insofar as they related in any way to the liability of individual appellees to Hapco (Tr. 142-

145). This motion was denied in a written opinion by the District Court (Tr. 148-177)[5].

Accordingly, the questions raised on this appeal are (1) whether the issue of the common law liability of the individual appellees, separate and apart from any liability as co-conspirators with International and Local 8, should have been submitted to the jury for their determination; (2) whether prejudicial error to Hapco resulted from the District Court's instructions to the jury on the liability of

---

[5] The only reference to Hapco's motion for a partial new trial in the twenty-eight-page opinion by the District Court was as follows:

> "Before dealing with defenses, it is well at this point to dispose of plaintiff Pineapple's motion for new trial upon the ground that the individual defendants could have been held upon the same ground and the same evidence as were the unions. Pineapple here repeats the same error as was made by the unions in contending that the verdicts were inconsistent.
>
> It is true that the Court may not have accurately stated the elements of liability at common law as to the individuals. But no exceptions were taken to the instructions upon this ground. The subject is highly complicated and the question of whether the state law or a common law adopted by the federal enactments applies is extremely nebulous. Certainly, the ground chosen by Pineapple for objection and exception cannot be maintained. The jury found against Pineapple on a fair statement of the common law. This motion for new trial is therefore denied." (Tr. 165)

the individual appellees; and (3) whether Hapco is entitled to a partial new trial on the sole issue of the common law liability of the individual appellees.

Inasmuch as the determination of whether a particular issue should have been submitted to the jury depends upon whether it was raised in the pleadings or the Pre-Trial Order and supported by evidence, there is set forth hereafter a summary of pertinent portions of the Pre-Trial Order and of the evidence.

A. The Pre-Trial Order

After extended pre-trial conferences (Tr. 183-348), the District Court entered a Pre-Trial Order which by its terms superseded the pleadings (Tr. 76). This Pre-Trial Order set out the contentions of the parties and the issues raised thereby.

Hapco contended that International, Local 8 and the individual appellees engaged in a conspiracy to commit various unlawful acts as follows:

> "6. That the defendant International, acting through its officers and agents and Local 8, and the defendant Local 8, acting through its officers, agents and members, and the individual defendants combined and conspired between August 22, 1949 and October 30, 1949 to boycott plaintiff's cargo of pineapple, to injure and damage plaintiff's business and property, to prevent the plaintiff from unloading or causing to be

unloaded its cargo of pineapple and from shipping or having the same shipped by interstate common carriers from the port of The Dalles, Oregon to San Jose and other points in California, and to violate Sections 303 (a) (1) and 303 (a) (4) of the Labor Management Relations Act of 1947, and that pursuant to said combination and conspiracy and in furtherance thereof the defendants engaged in and induced and encouraged the employees of employers engaged in unloading said barge and employees of employers engaged in transporting freight by rail and by truck between the states of Oregon and California to engage in a concerted refusal in the course of their employment to refuse to transport, handle or work on or perform any services in connection with plaintiff's cargo, with an object of forcing and requiring plaintiff and Isleways, Ltd. to cease doing business with said employers and with persons in the State of California to whom said cargo was being shipped, and other states, and of forcing and requiring said employers and persons to cease using, handling, transporting or otherwise dealing with plaintiff's pineapple and to cease doing business with plaintiff and with Isleways, Ltd.; and with the further object of forcing and requiring the port of The Dalles to assign the particular work of unloading said barge and of loading the cargo on railroad cars and trucks to members of defendant Local 8 rather than to its own employees; . . ." (Contention 6, Tr. 57-58).

In succeeding paragraphs, Hapco alleged various unlawful acts committed by the defendants: inducing breach of contracts between Hapco and the Port of The Dalles,

interstate truck carriers, and a crane company (Contention 6 (a), Tr. 58); inducing employees of interstate truck and rail carriers and the crane company to engage in concerted refusal in the course of their employment to perform any services on Hapco's cargo (Contention 6 (b), Tr. 58); picketing the terminal of the Port of The Dalles commencing September 26, 1949 (Contention 6 (c), Tr. 58); and rioting against Hapco as follows:

> "(d) Defendants on September 28, 1949 at about the hour of 2:00 P.M., forcibly and violently overran and thrust aside the police officers of the City of The Dalles who were on duty at the entrance to the terminal of the port of The Dalles and staged a riot upon the docks and in the warehouses of the port of The Dalles in which more than 100 members of the defendant union Local 8 participated; said defendants, many of them carrying knives, cargo hooks, 2x4s, axes and crowbars and other dangerous and deadly weapons, beat and injured employees of the plaintiff and other persons and damaged and wrecked trucks and a derrick belonging to or leased by plaintiff and damaged and threw into the Columbia River approximately 409 cases of pineapple, each case consisting of six No. 10 cans, which pineapple was wholly lost to the plaintiff; said defendants further cut and destroyed the hawsers holding the said barge to the dock and set the barge adrift." (Contention 6 (d), Tr. 58-59).

Other acts alleged were patrolling the streets of the City of The Dalles to further dissuade and intimidate employees of employers present at the terminal of the Port of The

Dalles from further discharging Hapco's cargo (Contention 6 (e) Tr. 59); and the picketing of the terminal again from October 20 until October 27, 1949 (Contention 6 (f) and (g), Tr. 59-60).

It was alleged that the foregoing acts caused employees of the Port of The Dalles, of interstate truck and rail carriers, and of the crane company to concertedly refuse on September 26, 1949, and thereafter, to perform any services in connection with Hapco's cargo, and also caused Hapco's employees to concertedly refuse in the course of their employment to perform any services from September 28 until October 19, 1949, and from October 20 until October 27, 1949. These acts allegedly forced Hapco to discontinue discharging its cargo and transporting the same to California between September 26 and October 30, 1949; required it to cease doing business with various processors of fresh fruits in California; caused the crane company to breach its agreement with Hapco and to cease doing business with it from September 26, 1949 on; and caused the Port of The Dalles to refuse to perform its agreement with Hapco and allow it to discharge its cargo from September 28 until October 19, 1949, and from October 20 until October 27, 1949 (Contention 7 (a), (b) and (c), Tr. 60-61).

As the direct and proximate result of the above activities, Hapco contended that it was injured in its business and property and sustained damages in the amount of $234,-

280.29, which claimed damages were thereafter specified in detail as to their nature and amount (Contention 8, Tr. 61-63).

In response, the two labor organizations and the individual appellees in their contentions denied all of Hapco's contentions that any of the defendants, singularly or in concert with each other, performed any of the alleged acts (Contentions 6, 7, 13, Tr. 63-64). They also asserted that Hapco's contentions did not state a claim upon which relief could be granted against the individual appellees, in that Section 303 of the Act did not authorize actions for damages against individuals (Contention 16, Tr. 65).

From the contentions of each of the parties, the Pre-Trial Order set forth the following "Issues", among others, to be determined at the trial:

> "(5) Was there any conspiracy to injure the plaintiff in its business, as alleged, which said conspiracy was participated in by the defendant International, the defendant Local, the defendant individuals or any of them?" (Tr. 66)
>
> *acts and conduct alleged by plaintiff?"* (Tr. 67) (Italics supplied)
>
> "(9) If so, did the alleged acts and conduct cause the consequences claimed by plaintiff?" (Tr. 67)
>
> "(10) If so, were such acts and conduct the proximate cause of damages alleged to have been sustained by plaintiff?" (Tr. 67)

"(11) If so, what was the amount of the damages that plaintiff allegedly sustained?" (Tr. 67)

"(16) *Were all of the alleged acts allegedly done or performed by any of the defendants, either singularly or collectively, violative of any right or rights of the plaintiff?*" (Tr. 67) (Italics supplied)

"(18) Was there any conspiracy to injure the plaintiff in its business, as alleged, which said conspiracy was participated in by the defendant International, the defendant Local, the defendant individuals or any of them?" (Tr. 68)

"(22) (a) Did the defendants engage in a combination and conspiracy to boycott plaintiff's cargo and to injure its business, etc., and engage in various acts and conducts in furtherance thereof as alleged by plaintiff?" (Tr. 68)

"(23) If so, did the alleged combination and conspiracy and the acts and conduct in furtherance thereof cause injuries to plaintiff's business and property?" (Tr. 68-69)

"(24) If so, did such injuries cause plaintiff to suffer damages in the sum of $234,280.29, together with reasonable attorney's fees in the amount of $25,000.00?" (Tr. 69)

B. The Evidence Relating[6] to Individual Appellees.

In support of its contentions, Hapco adduced proof at the trial, which was substantially uncontroverted insofar as the individual appellees were concerned, and from which the jury would have been warranted in finding the facts hereafter summarized.

[The Background]

The so-called "Great Hawaiian Dock Strike"[7] was the background to the present action and the activities of the individual longshoremen. The strike was called by International and its affiliated local union in Hawaii against the stevedoring companies and commenced May 1, 1949 (Tr. 1017). Because of it, Hapco was thereafter unable to export pineapple through its usual method of using ocean freighters (Tr. 1018).

Faced with orders for 68,300 cases of pineapple from processors of fresh fruit in California (Tr. 912-913, Exhibit

---

[6] It should be noted that the factual picture hereinafter set forth is incomplete, in that evidence relating to the activities of International and Local 8 is not discussed but will be considered in connection with their appeal.

[7] Generally, see Brissenden "The Great Hawaiian Dock Strike", 4 Labor Law Journal 231 (April, 1953).

188) and requiring pineapple at its own plant at San Jose, California, Hapco in August, 1949, chartered ocean-going barge YFN from the United States Navy (Tr. 1014-1015, 1018). The barge was loaded by employees of Isleways, Ltd., a wholly owned subsidiary of Hapco, at the latter's terminal in Honolulu, with a cargo of approximately 115,000 cases of pineapple worth more than $680,000.00 (Tr. 915, 918-919, 1014, 1015, 1091). The barge was towed across the Pacific Ocean by an ocean-going tug owned by Isleways, Ltd., for delivery of the cargo in California to these processors and to Hapco's own plant (Tr. 1018, 1019-1020).

There was no picketing, disturbances or labor difficulties of any kind in connection with the loading and dispatching of the barge (Tr. 1016, 1017). Hapco and Isleways were not engaged in any dispute with their own employees and were not parties to the dispute between the stevedoring companies and International and its affiliated local union (Tr. 1015-1018).

When it proved impossible to unload the barge in the San Francisco Bay area or at Tacoma, Washington, the barge was towed from the latter port up the Columbia River to the terminal of the Port of The Dalles at The Dalles, Oregon, lying approximately 90 miles east of Portland (Tr. 1020-1025). The barge arrived at The Dalles on the evening of Saturday, September 24 (Tr. 1025).

Before the arrival of the barge, Hapco had entered into an agreement with the Port of The Dalles, a municipal corporation, whereby the Port undertook to discharge and unload the pineapple from the barge and to load it upon railroad cars and trucks for shipment to California (Tr. 474-483, 496-500, 1024). Hapco had also entered into an agreement with the Goodat Crane Service for the lease of a crane and an operator to lift the pineapple from the barge to the Port dock (Tr. 883, 1040). These agreements were made with a view to commencing the unloading of the pineapple from the barge on September 26 (Tr. 1041).

[Pre-Riot Activities]

On September 23rd, before the arrival of the barge at The Dalles, appellee Meehan (the representative of International in Oregon) called on some of the Commissioners of the Port of The Dalles for the purpose of forcing the Port to give up its agreement with Hapco to unload the barge (Tr. 477-480, 500-502). Labeling the barge "hot cargo", Meehan, when told that the Port was an open one, replied, "You wouldn't tie up a barge load of dynamite, would you?" (Tr. 478). Meehan threatened that the port would be picketed (Tr. 478-501).

On September 25, the crane leased by Hapco was brought to The Dalles (Tr. 876, 883). As it was being

assembled, a number of longshoremen, who had been standing near the entrance to the Port dock, came over to tell Goodat's employees that they had better not take the crane out on the dock if they intended to unload some "hot pineapple" because "it is liable to melt the boom off, and it won't be healthy for you." (Tr. 879). Thereafter, when the owner of the crane was threatened at his home by two men who identified themselves as from "the Hawaiian pineapple job" at The Dalles, he terminated the lease arrangement and Hapco was forced to buy the crane (Tr. 885-886, 1041).

On September 26, Meehan, in the company of appellee Baker (President of Local 8) and others, again called on some of the Commissioners of the Port (Tr. 480-485, 502-505). Displaying a belligerent attitude, he threatened the Port not to unload the barge, saying that he had 20 pickets there and could easily get 200 more (Tr. 481-482).[8]

As appellees Meehan and Baker had threatened, on September 26 various individual longshoremen together with a single Hawaiian from the local union affiliated with

---

[8] Meehan also claimed that Local 8 had a contract with the Port of The Dalles because longshoremen from Local 8 had once unloaded an ocean-going vessel at the port in 1938 (Tr. 480-81, 504). However, the Commissioners were unable to find any such contract and testified that Meehan did not want to unload the barge but only wanted to prevent its being unloaded (Tr. 481, 504).

International in Hawaii, began to mass and picket at the entrance to the Port dock (Tr. 417, 506, 1254). The local manager of a truck line estimated there were from 75 to 100 longshoremen by the Port dock and around The Dalles on September 27 (Tr. 584).

[The Riot]

On Wednesday, September 28, at approximately 7:00 A.M., the Port began to unload the pineapple from the barge and to load it on two Hapco flat bed trucks (Tr. 507, 597, 614, 1038, 1043-1044). Involved in the unloading operation were the Port's own employees, and a superintendent, crane operator and truck drivers employed by Hapco (Tr. 507, 949-950, 1042, 1079).

Meanwhile, on Wednesday morning, in answer to an appeal by appellee Baker over the loud speaker at the Union Hall of Local 8 in Portland, admittedly at least 150 to 200 members of Local 8, including all of the appellees (except Sovolatenko), drove from Portland to The Dalles, a distance of some 90 miles, there to assemble before the entrance to the Port dock (Tr. 1275-1276, 52-54).[9]

By noon over 200 longshoremen were massed in a picket

---

[9] Photographs of the dock and terminal of the Port of The Dalles are shown in Exhibits 69, 70 and 71. A blueprint of the dock will be found in Exhibit 182.

line before the entrance to the dock (Tr. 433-434, 506, 585).[10] On duty to maintain order were eight special policemen and five or six regular police officers of the City of The Dalles (Tr. 596). The longshoremen were, according to an officer of nineteen and one-half years experience with the Oregon State Police, "rather loud and boisterous and in a quarrelsome mood to anyone that went through the line" (Tr. 432, 438). Every vehicle that went in and out of the Port dock was checked and every driver asked if he had any dealings whatsoever with Hapco. If not, the driver was given a slip saying that he had no connection with Hapco and was permitted to go onto the dock (Tr. 438-439, 548). Even one of the Port Commissioners driving off the dock was told by Meehan "you are doing something here that you will regret the rest of your life" (Tr. 507-508).

On hearing that Hapco had two large trucks waiting outside The Dalles to come in to the dock, four of the appellees went from the dock to meet Hapco's truck drivers. Their purpose was to persuade these employees to refuse to drive the trucks on to the dock. However, after receiv-

---

[10] A visual picture of some of the massed pickets at the entrance to the Port dock may be obtained from Exhibits 47, 49 and 50, which show the scene at approximately 10:30 A. M., and from Exhibits 54 and 62 showing the same scene shortly after noon. (Notice the clock in the upper right hand corner of photographs.)

ing a clearance from their own A. F. of L., Teamsters local union, the drivers decided to proceed to the dock (Tr. 677-680, 695, 1098-1099, 1119, 1121-1122, 1125-1126, 1136, 1140-1141, 1143).

At about 2:00 P.M. these two large trucks, with their four drivers, came up to the entrance to the Port dock (Exhibit 42). A rock was thrown by the appellee Gillis through the windshield of one of the trucks and somebody yelled, "Let's get them" (Tr. 355-357, 441, 663, 1220). From then on, according to Sergeant U'Ren of the Oregon State Police "it was a riotous mob, screams and catcalls, and every foul name that they could use" (Tr. 441). As the second truck started through the gates leading onto the dock, the Assistant Chief of Police of The Dalles testified that the mob came "just like a wall" (Tr. 599). They pushed and shoved their way through the gate and through the policemen on duty, and rushed onto the dock (Tr. 356-360, 523, 599, Exhibit 34). Altogether a mob estimated at over 200, "all running more or less" went onto the dock, their yells sounding like a "terrific growl" to a Port Commissioner on the dock (Tr. 450-451, 509-510).

Some of the mob ran up to the last Hapco truck to enter the gate and cut its air line so as to lock its brakes. The two drivers were told by a man, who held a steel cargo hook up over his head, to "get out or we will kill you" (Tr. 666-669, 684). Each of the drivers was pulled out, brutally

beaten and kicked in the face and in the head until he finally agreed to go back to California. They were then made to back the truck off the dock (Tr. 668-669, 684-685, 366-368).

Others of the mob passed by the rear truck and ran up to the first Hapco truck (Exhibit 41). Again air hoses were loosened. The driver, who had gotten out, was hit on the head with a "hammer handle or something" and, after he was down, was kicked in the jaw (Tr. 688-689, Exhibit 37). The other driver was jerked out of the seat on his back and hit hard on his head. As he lay on the dock a longshoreman stood over him with a cargo hook saying, "I ought to crash this through your skull" (Tr. 524, 689, 1002, Exhibit 45). When told to "concentrate on the equipment" instead of the men, a gang of about 40 to 50 of the longshoremen tried to tip the truck over and were able to raise it four or five feet off of the dock but could not get it all the way over.[11] Others broke the headlights and pulled out the trucks' wiring (Tr. 364, 411, 509, 524-525, 526-527, 579).

Still others ran past the two trucks into a covered warehouse area on the dock. A carpenter foreman working on the dock estimated that 150 to 200 men ran in (Tr. 550). They grabbed 2x4s, 4x4s, steel bolts, all available sticks, and one man even went into the Coast Guard workshop and

---

[11] A dramatic picture of the mob of longshoremen trying to tip over Hapco's truck is shown on Exhibit 44.

came out with axe handles in both hands (Tr. 550, 564-565, 578-579, 646). They were screaming "Get the goddam scabs" and seemed to a Coast Guard man on duty just like a "bunch of mad men" (Tr. 571, 578). When they reached the two Hapco flatbed trucks which had been loaded with pineapple from the barge, they ripped the canvas covering the cases of pineapple, slashed the ropes holding the cargo, dumped the pineapple off the trucks, threw a 4x4 through the windshield of one of the trucks, slashed at the tires and at the trucks themselves with an axe, and broke the fuel lines (Tr. 469, 486, 510, 527, 550-552, 564-565, 568, 581). All the while the men were shouting "no violence" (Tr. 468, 647-648).

After the mob had passed through the warehouse and reached the open space in the dock, where the crane was unloading the pineapple from the barge, they began to fight with all the port and Hapco employees engaged in this work. (Tr. 403-406). The supervisor of Hapco's trucks was set upon by 15 or 20 of the men, held and hit over the head with a 2x4, and then kicked in the face, ribs and stomach (Tr. 568, 1012). Three cameramen present were assaulted and their cameras smashed (Tr. 410-411, 529, 550-551, 648-651). As many men as possible gathered around the crane and tried up tip it over into the river. The engine of the crane was jimmied and smashed at with a crowbar and loose tools from the crane were thrown into the

river (Tr. 511, 528, 550, 570, 648). Cases of pineapple were tossed over the edge of the dock into the river as fast as the men could throw them (Tr. 528, 579, 648). The thick manila hawsers holding the barge to the dock were cut (Tr. 472, 511, 568)[12].

Various witnesses testified that the damage wrought by the rioting longshoremen was not the acts of various individuals acting alone but was done by "team work" All of the individual longshoremen did not engage in one act but spread out. All did damage at the same time. All seemed to know their job and all knew exactly what they were doing (Tr. 571, 574, 580, 660).

After being on the dock an estimated 25 to 30 minutes, the mob walked off the dock in an orderly way and assembled near the dock entrance (Tr. 369, 510, 560, 572, 698). Meehan addressed them saying that they were supposed to have been peaceful pickets but that "they had done a fine job." (Tr. 369-370, 461). Later the Mayor of The Dalles located Meehan and read him a riot proclamation (Tr. 460).

Admitted in evidence were three different motion pictures (Exhibits 74, 75 and 76), which were filmed at

---

[12] Two photographs (Exhibits 38 and 46) particularly show the scene at the open space in the dock while the longshoremen were still milling about.

various stages of the riot and present visual evidence in corroboration of the testimony of Hapco's witnesses. Arrangements will be made to have these motion pictures shown to the Court.

On the day following the riot some 200 to 300 longshoremen returned to The Dalles. Prevented by a temporary restraining order and a force of around 52 Oregon State policemen from picketing the Port of The Dalles dock, the longshoremen patrolled the streets of the city in mobs of 15 or 20, crowding people off of the sidewalks and generally terrifying the community (Tr. 443-445, 457, 461-463, 1042).

[The Results]

As a result of the riot, the Port of The Dalles was forced to discontinue the unloading of the barge (Tr. 486). Hapco's crane and trucks were out of commission from the damages they suffered during the riot and had to be repaired (Tr. 486, 686, 1038). However, it proved to be impossible to effect repairs to the crane until about ten days after the riot (Tr. 1040).

By that time, however, Hapco had sustained the largest element of its damage. Hapco's plant at San Jose, California, had previously purchased large quantities of perishable peaches, pears, and grapes to be mixed with cherries

and with pineapple from the barge in preparing and canning "fruit cocktail". To prevent the spoilage of these fresh fruits while awaiting the arrival of the pineapple, Hapco's plant had been forced to process and can them into a mixture known as "fruit mix" on successive days from September 27 until October 6 (Tr. 935-939). By October 7 all the fresh fruit had been processed and canned (Tr. 916). Inasmuch as there was no market for fruit mix (Tr. 938, 988-989, 995-996), Hapco was required to reprocess all of it after the eventual receipt of the pineapple from the barge in November so as to make fruit cocktail (Tr. 939, 941).

Extensive testimony was received concerning Hapco's costs of converting fruit mix into fruit cocktail, from which it was possible to compute the reprocessing costs involved by reason of the failure to receive pineapple by September 29th, the day on which pineapple would have been delivered at the plant had it not been for the riot (Tr. 938-949, 956-958, 990-991). There was also detailed testimony as to various items of damage or expense to Hapco caused by the activities of the individual longshoremen, such as the repairing of the trucks and the crane (Tr. 1056-1057), charter fees of the barge and its tug (Tr. 1051-1052, 1061), special police (Tr. 1060), lost cases of pineapple (Tr. 918-919, 1048), cut mooring lines (Tr. 1061),

medical and hospital bills of injurde employees (Tr. 1066-1067), etc.[13]

[Individual Participants]

Twenty-two of the appellees[14] were arrested, indicted by the Grand Jury, and convicted in the Circuit Court of the State of Oregon for the County of Wasco of the crime of Riot in violation of Section 23-801, Oregon Compiled

---

[13] In view of the limited questions raised on this appeal, the concern has been to set forth the activities of the individual appellees and the general damage resulting therefrom. The specific items of damage and their amounts are, of course, questions of fact for determination by the jury.

[14] Aden, Baker, Bantin, Bletch, Caramanica, Dollarhide, Foster, Howard E., Foster, Henry L., Goevelinger, Gayeski, Gillis, Hahn, Ingram, Kephart, Lambert, Montroy, Albaloni, alias Miller, Nielsen, Settje, Swanson, York and Zimmer (Exhibit 26).

Laws Annotated[15], by pleading guilty to the indictment which charged, in part, that each of them:

> ". . . and 100 or more other persons to the Grand Jury unknown, on the 28th day of September, 1949, in the County of Wasco, State of Oregon, then and there being, and said defendants and other persons then and there acting together and carrying dangerous weapons, namely, cargo hooks, iron bars, rocks, an ax, knives, clubs and sticks, and then and there encouraging and soliciting other persons participating with them to acts of force and violence, did then and there unlawfully, feloniously, routously, riotously and tumultuously assemble and congregate, without authority of law and in a manner adapted to disturb the public peace and excite public alarm; and did then and there unlawfully, feloniously, wilfully, routously, riotously and tumultuously use force and violence and

---

[15] Section 23-801, O.C.L.A., provides:

"RIOT AND UNLAWFUL ASSEMBLY. Any use of force or violence, or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together, and without authority of law, is riot. Whenever three or more persons assemble with intent, or with means and preparation to do an unlawful act, which would be riot if actually committed, but do not act towards the commission thereof, or whenever such persons assemble without authority of law, and in such manner as is adapted to disturb the public peace or excite public alarm, or disguised in a manner adapted to prevent them from being identified, such assembly is an unlawful assembly."

threaten to use force and violence, which threats were then and there accompanied with immediate power of execution, and on being so assembled and congregated, as aforesaid, the said defendants did then and there unlawfully, wilfully, routously and riotously trespass upon inclosed premises not their own, or either of them, namely, the premises of the Port of The Dalles, and did then and there unlawfully, routously, riotously and feloniously make an assault upon Don Higham, Eugene Hoard, Elvy Davis, Clarence Rosales and Raymond Curto, by then and there unlawfully and feloniously striking and beating them with said cargo hooks, iron bars, clubs and sticks; and did then and there unlawfully and wilfully assault and beat George Lindsay and Hugh Ackroyd; and did then and there unlawfully routously, riotously, feloniously, maliciously and wantonly destroy and injure the personal property of another, namely, 1 camera the property of George Lindsay; 1 camera the property of Hugh Ackroyd; 1 camera the property of Robert Lachenbach; 4 motor trucks, 1 power crane, 150 cases of pineapple and 3 manila hawsers, the property of Hawaiian Pineapple Company, ltd., thereby then and there greatly terrifying, alarming and disturbing not only Ralph Q. Johnson and Clifford J. Deane, but many and all the good and peaceable people then and there passing and being, contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon." (Exhibit 26)

Thirty-eight other appellees admitted during the pretrial conferences or in their depositions that they had gone

upon the dock of the Port of The Dalles during the riot on September 28[16].

Of the remaining 36 appellees all except one were in The Dalles on September 28 at or near the Port dock[17]. Of this latter group four were involved in trying to induce Hapco's truck drivers to refuse to drive their trucks to the dock[18].

---

[16] Anderson, Barrett, Christiansen, Ferraris, Green, Hall, Hamllik, Jaschina, Geo. G. Jones, Geo. Jones, Kullberg, Mackey, Palmer, Piwarchuck, Raske, Joe Ross, Wm. Ross, Schafer, Simpson (Tr. 116), Streiff, Yazalino, Brown, Burk, Campbell, Drake, Ewing (Tr. 91), Flower, Hansen, Headrick, Helland, Harold Jones, Kasin, Larsen, Mazor, Pinkham, Roberts, Still, Tracas (unless otherwise noted, all references are to Tr. 52-54).

[17] Alberg (Tr. 78), Atwood (Tr. 52, 78), Backstrom (Tr. 52, 79), Bailey (Tr. 79), Ezra Baker (Tr. 52, 79), Bjorge (Tr. 52), Carpenter (Tr. 52, 86), Chiles (Tr. 52, 86), Cule (Tr. 52, 86), Delk (Tr. 52, 87), Ede (Tr. 52, 89), Erickson (Tr. 52, 90), Hiltunen (Tr. 53, 98), Hjerpe (Tr. 53, 98), Hopp (Tr. 53, 99), Hoskin (Tr. 53, 99), Jennings (Tr. 53), Johnson (Tr. 53, 102), Lang (Tr. 53, 105), Laurer (Tr. 53, 106), Leichtman (Tr. 53, 106), Lemieux (Tr. 53, 107), Lowrey (Tr. 53, 107), O'Bray (Tr. 53), Olson (Tr. 53, 110), Perkins (Tr. 53, 110), Pilcher (Tr. 53, 111), Quist (Tr. 53, 112), Storseth (Tr. 53, 117), Roy Swanson (Tr. 53, 118), Thomas (Tr. 53, 118), Walter (Tr. 53, 119), Wojok (Tr. 53, 120), Yevtich (Tr. 53, 121), Young (Tr. 53, 121), Zeller (Tr. 53, 122).

[18] Alberg (Tr. 1136), Backstrom (Tr. 1098-1099, 1112), Olson (Tr. 1121-1122), Storseth (Tr. 1136).

Six of the appellees testified in depositions to engaging in acts of assault and battery[19], and seven others testified to seeing these acts or the results thereof[20].

Seven of the appellees testified to damaging or meddling with Hapco's property[21]. Only ten of the appellees admitted trying to tip over the truck[22], though Exhibit 44 shows well over thirty individuals involved in this activity. One appellee admitted trying to tip the crane[23], and ten others admitted that they threw cases of pineapple into the Columbia River[24].

---

[19] Bletch (Tr. 82), Caramanica (Tr. 85), Dollarhide (Tr. 88), Drake (Tr. 89), Lambert (Tr. 104), Montroy (Tr. 109).

[20] Aden (Tr. 78), Barrett (Tr. 81), Hamllik (Tr. 96), Kephart (Tr. 103), William Ross (Tr. 114), Settje (Tr. 115), Simpson (Tr. 116).

[21] Bletch (Tr. 83), Drake (Tr. 89), Gillis (Tr. 94), Lambert (Tr. 105), Montroy (Tr. 109), Streiff (Tr. 118), Yazalino (Tr. 120).

[22] Aden (Tr. 78), Dollarhide (Tr. 88), Drake (Tr. 89), Ewing (Tr. 91), Howard E. Foster (Tr. 93), Headrick (Tr. 97), Kephart (Tr. 103), Raske (Tr. 113), William Ross (Tr. 114), Swanson (Tr. 118).

[23] Jaschine (Tr. 101).

[24] Aden (Tr. 78), Bletch (Tr. 83), Ferraris (Tr. 91), Howard E. Foster (Tr. 93), Gillis (Tr. 94), Jaschine (Tr. 101), Kephart (Tr. 103), Montroy (Tr. 109), William Ross (Tr. 114), Swanson (Tr. 118).

SPECIFICATION OF ERRORS

1. The District Court erred in failing to submit to the jury the issue of the common law liability of the individual appellees to Hapco as a result of their unlawful activities, separate and apart from any issues of their liability as co-conspirators with International and Local 8.

2. The District Court erred in refusing to give to the jury the following instructions requested by Hapco:

> "If you find from a preponderance of the evidence that certain individual defendants on or about September 28, 1949, in a riotous and tumultuous manner entered upon the dock of the Port of The Dalles and thereby placed in fear the employees of the plaintiff or of the Port of The Dalles, or of any other employers who were engaged in business with the plaintiff with an object of intimidating said employees and inducing them to refuse to perform their services for the plaintiff and other employers, and you further find that plaintiff sustained damages as a proximate result of such activities of the defendants, then your verdict should be for the plaintiff and against such defendants who participated, in such amount as will reasonably compensate it for the damage to its business and property." (Tr. 130)
>
> * * *
>
> "If you find from the preponderance of the evidence that on September 28, 1949, at about the hour of 2:00 p.m. certain individual defendants entered upon the dock of the Port of The Dalles and there in a loud, riotous and tumultuous manner assaulted cer-

tain employees of the plaintiff and damaged property and cargo belonging to the plaintiff and resisted the police officers of the City of The Dalles, all of the individual defendants who participated in the raid upon the dock are liable for all of the injuries and damages inflicted by any of the rioters if any such damages or injuries were inflicted." (Tr. 130-131)

* * *

"In the assessment of damages against the various defendants, you should consider the date as of which the defendant or defendants commenced the activities herein complained of, bearing in mind plaintiff's claim that its damages were sustained during a period commencing September 26, 1949. Accordingly, if you find from a preponderance of the evidence that each of the defendants, as a result of a conspiracy, engaged in the activities herein complained of and that plaintiff's losses, if any, commenced as of September 28, 1949, then each of the defendants would be liable for all of the damages, if any, sustained on and after that date regardless of whether he or they participated in the unlawful activities subsequent to that date. On the other hand, if you find from a preponderance of the evidence that there was no conspiracy, then the defendants may only be held liable for such damages, if any, that plaintiff sustained as a result of the activities of such defendant or defendants, bearing in mind the instruction which I have given you as to responsibility for the damages resulting from the riot, if any.

"I further instruct you that the plaintiff Hawaiian Pineapple Company can make only one recovery of the damages, if any, awarded to it in this action, and that if you should find for the plaintiff

against some of the defendants in one sum and against others of the defendants for another sum, the plaintiff would be only entitled to recover the larger sum awarded, and is not entitled to recover the total of the different sums awarded." (Tr. 133-134)

Hapco objected to the refusal of the District Court to give instructions that it was entitled to recover against the individual appellees, even if the Labor-Management Relations Act, 1947, was not involved in the action, because of the wrongful physical activities engaged in by the individual appellees in preventing Hapco from carrying on its business operations (Tr. 1450-1451).

3. The Distirct Court erred in giving the following instructions to the jury:

"Now, I want to mark that point. If you find under these instructions that I have just given you that neither of these unions is liable, neither the International nor the local, then you shall promptly enter a verdict in favor of all the defendants and against the plaintiff. That includes the individuals and everyone else. Now if you have, however, found liability under these instructions as to one or both unions, the International and local, then you may consider the liability of the individual defendants. In other words, you have to find the unions or one of them liable under the first part of the instructions before you can consider any individuals." (Tr. 1435)

* * *

"If you find from the evidence, that the individual defendants, [1726] among themselves or together with the Defendants International and Local 8, or either of the unions, conspired together to restrain trade and commerce between the Territory of Hawaii and any state of the United States, and to encourage or induce the employees of any employer by concerted action in the course of their employment to refuse to transport, handle or work upon a cargo of pineapple at The Dalles, Oregon, or to perform any services in connection therewith, with the object of forcing any employer or other person to cease doing business with any other person, and with the purpose of doing injury to the business or property of the plaintiff, and that said damage to business or property was actually accomplished, then plaintiff is entitled to recover against any individuals who, knowing of the unlawful intent, did any act in furtherance thereof and reasonably calculated to effect the object of the conspiracy." (Tr. 1436-1437)

* * *

"If you find there was no conspiracy involving any individual defendants, then your deliberations will be confined to the defendant unions alone in accordance with the [1728] previous instructions. If as to any individual defendant you find he was not a member of such conspiracy or did no act in furtherance of any conspiracy, knowing of the common design and with the purpose of aiding and abetting the common object, then you should find in favor of that defendant." (Tr. 1438-1439)

* * *

"If you find that the International, acting through its agents or officers, in the course of their employ-

ment, or through Local 8 and Local 8 itself, through its officers and [1729] agents or members, in the course of their employment, induced or encouraged employes of any employer to engage in a concerted refusal in the course of their employment to transport or otherwise handle any goods, articles or commodities, or otherwise handle, work on or perform services in connection with any goods, if one of the objects of the inducement and encouragement was to force or require any person to cease doing business with any other person, and as a direct result plaintiff was injured in business or property, then you may find liability against both the union defendants.

If you find only one is so liable, then you will find liability against such defendant.

If you do not so find, you will return a verdict for all defendants and against the plaintiff.

But if you find one of the defendant unions liable, or both of the defendant unions liable, and if on further consideration you find that the defendant union or unions against whom you have found liability further entered into a conspiracy, as above described, with the individual defendants, you will add to the verdict the names of all the individual defendants against whom you find." (Tr. 1439-1440).

Hapco objected to these instructions to the effect that there could be no verdict against the individual appellees unless the unions were also found liable, on the ground that the cause of action against the individual appellees was broader than a conspiracy to

restrain trade and was directed against and included the riot and the other activities the individual appellees engaged in to physically stop Hapco's business operations (Tr. 1450).

4. The verdict in favor of the individual defendants is contrary to the clear weight of the evidence and to law.

ARGUMENT

I.

THE ISSUE OF THE COMMON LAW LIABILITY OF THE APPELLEES FOR THEIR UNLAWFUL ACTS CAUSING DAMAGE TO HAPCO SHOULD HAVE BEEN SUBMITTED TO THE JURY SEPARATE AND APART FROM THE ISSUE OF THEIR LIABILITY AS CO-CONSPIRATORS WITH INTERNATIONAL AND LOCAL 8, AND THE FAILURE AND REFUSAL OF THE TRIAL COURT TO DO SO CONSTITUTED PREJUDICIAL ERROR.

A. Conspiracy not Gravamen of Hapco's Action.

Although Hapco contended in the Pre-Trial Order that International, Local 8, and the individual appellees combined and conspired to engage in various alleged unlawful acts (Tr. 57-58), it was not essential to recovery that such a conspiracy be proved.

A conspiracy may be pleaded and proved in order to connect a defendant with a transaction and to charge him with the acts and declarations of his co-conspirators without which he would not otherwise be implicated. See International Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp., 189 F. (2d) 177 (CA 9, 1951) aff'd, 342 U.S. 237; Gabriel v. Collier, 146 Or. 247, 255, 29 P. (2d) 1025, 1028 (1934).

It is fundamental, however, that a charge of conspiracy is not the gravamen of a complaint. Even if a conspiracy is not proved, a plaintiff may still recover damages against such of the defendants as are shown to be guilty of unlawful acts which directly result in damage to the plaintiff. James v. Evans, 149 F. 136 (CA 3, 1906); Keller v. Commercial Credit Co., 149 Or. 372, 40 P. (2d) 1018 (1935); Gabriel v. Collier, supra; see Howland v. Corn, 232 F. 35, 40 (CA 2, 1916); Ewald v. Lane, 104 F. (2d) 222 (CA. D.C., 1939), cert. denied, 308 U.S. 568.

B. Common Law Liability of Appellees for Damages caused Hapco, Regardless of Conspiracy.

The evidence previously summarized is overwhelming and largely without dispute that on September 28, 1949, a mob of over 200 longshoremen, including the individual appellees to the extent therein set forth, stormed in a group

through the gates of the dock of the Port of The Dalles and staged a riot on the dock. During the course of this rioting, they injured and destroyed Hapco's property, assaulted and terrified its employees and other persons present, forced the Port of The Dalles to discontinue unloading the barge, and by thus preventing the delivery of needed pineapple to its California plant caused Hapco to incur heavy reprocessing expenses.

These unlawful acts directed against Hapco created in it a right of action under the common law against each and all of the persons who participated therein, for it is a well recognized and frequently applied principle that all persons who are responsible for or who participate in mob violence are liable for the necessary and natural consequences thereof. 46 Am. Jur., Riots and Unlawful Assembly, Sec. 18, p. 135; Calcutt v. Gerig, 271 F. 220 (CA 6, 1921); Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911).

That the individual appellees and others, who stormed onto the dock, constituted a rioting mob bent on wrecking their unlawful havoc on Hapco, is evident not only from the undisputed fact that twenty-two of the appellees admitted this by their plea of guilty to the indictment charging them with the Oregon statutory crime of Riot (Exhibit 26), but also from a previous decision of this Court, Salem Mfg. Co. v. First American Fire Ins. Co. of New

York, 111 F. (2d) 797 (1940), setting forth the common law authorities with respect to what constitutes a riot.

Even if the appellees and Hapco had occupied an employee-employer relationship to each other, the acts of violence committed by the appellees were unlawful and have always been so recognized by all courts. See, in Oregon, for example, Wallace v. International Association, 155 Or. 652, 663-664, 63 P. (2d) 1090, 1095 (1936); Starr v. Laundry Union, 155 Or. 634, 648-649, 63 P. (2d) 1104, 1109-1110 (1936). For damages suffered through violent means, it is further recognized that a plaintiff has a remedy at law for the unlawful torts committed against it. See, for example, Restatement, Torts, Vol. IV, p. 93.

For the injuries to its property and business as a result of the intentional and unjustified actions of the participating appellees, Hapco was entitled to be compensated in accordance with the general rules of damages, 46 Am. Jur., Riots and Unlawful Assembly, Sec. 19, p. 136. At the very minimum Hapco would have the right to be compensated for all of the actual out-of-pocket expenses it was forced to incur as a direct and proximate result of the unlawful acts of the appellees.

C. Issue of the Common Law Liability of Appellees was Raised by Pre-Trial Order and Supported by Proof.

In its contentions in the Pre-Trial Order, Hapco alleged the various unlawful actions committed on September 28 by the appellees in violently entering the Port dock and staging a riot thereon with consequent damage to Hapco's employees and property (Tr. 58-59). Moreover, Hapco alleged the damages which it had sustained to its business and property by reason of these and other activities of the appellees (Tr. 61-63). These allegations were denied by the appellees (Tr. 63, 65).

Specifically framed as "issues" in the Pre-Trial Order were those of whether the individual appellees "engaged in the acts and conducts alleged" by Hapco (Issue 8, Tr. 67); and if so, whether such acts and conduct were the proximate cause of damage to Hapco and, if so, in what amount (Issues 9, 10, 11, Tr. 67). Also framed as "issues" were whether the appellees and International and Local 8 engaged in various acts and conduct in furtherance of a conspiracy to boycott cargo and injure its business (Issue 22 (a), Tr. 68); and, if so, whether the alleged conspiracy and acts in furtherance injured Hapco's business and property (Issue 22 (b), Tr. 68-69).

The Pre-Trial Order further raised as an issue to be determined at the trial whether the alleged acts of any of

the defendants, either singularly or collectively, were a violative of any rights of Hapco (Issue 16, Tr. 67).

On the issues thus posed, Hapco presented direct and unrebutted proof that the appellees engaged in unlawful acts by their riotous conduct of September 28 and that these unlawful acts were the direct and proximate cause of damage to Hapco's property and business. Yet the District Court, as will be shown, failed and refused to submit these issues, so raised and supported by the proof, to the jury.

In analyzing Hapco's contentions in the Pre-Trial Order, it should always be kept in mind that Hapco was charging International and Local 8 with violating Sec. 303 (a) (1) of the Act. Accordingly, Hapco's contentions were cast in terms of the many statutory requirements or elements necessary to bring a suit for damages under Sec. 303 (b) of the Act. Such contentions should not, however, be allowed to obscure the contentions made by Hapco and framed as issues at the trial that the appellees engaged in unlawful riotous activities on September 28 and thereby caused damage to Hapco. Admittedly, the Pre-Trial Order raised other issues as to the common law liability of the appellees for engaging in various other activities, besides the riotous acts of September 28, pursuant to a combination and conspiracy between the two unions and the individual appellees. The presence of these other issues in the action does not preclude Hapco from

having a narrower issue, which it had raised by the pleadings and supported by the proof, submitted to the jury.

D. The Failure and Refusal of the District Court to Submit Separately the Issue of the Appellees' Common Law Liability.

Despite previous requests made to it by Hapco, the District Court failed to give any instructions whatsoever with reference to the common law liability of the individual appellees separate and apart from their liability as co-conspirators with International and Local 8 or either of them.

The only instructions of the District Court with respect to the liability of the individual appellees were given upon the basis that *only if* International or Local 8, or both, were found liable under the instructions given as to the liability of these labor organizations for violating the Act, could the jury then consider the liability of the individual appellees, and then *only if* the appellees or any of them entered into a conspiracy with the unions, or either of them (Tr. 1435, 1438, 1440).

Prior to the argument of the case and the instruction of the jury, Hapco had submitted one instruction in particular which would have squarely submitted to the jury the issue of the common liability of the individual appellees

for their riotous activities of September 28[25]. In accordance with Hapco's intention of allowing the jury to pass directly upon the liability of each of the individual appellees, regardless of whether they were also engaged in a conspiracy among themselves or with the unions, the requested instruction made no reference to any conspiracy. Instead it simply presented to them the rule of law that the individual appellees who participated in the riotous activities of September 28 were liable for all of the damages they inflicted on Hapco.

In harmony with this requested instruction, Hapco had also submitted another requested instruction dealing with the assessment of damages against the various defendants

---

[25] The requested instruction provided:

"If you find from the preponderance of the evidence that on September 28, 1949, at about the hour of 2:00 p.m. certain individual defendants entered upon the dock of the Port of The Dalles and there in a loud, riotous and tumultuous manner assaulted certain employees of the plaintiff and damaged property and cargo belonging to the plaintiff and resisted the police officers of the City of The Dalles, all of the individual defendants who participated in the raid upon the dock are liable for all of the injuries and damages inflicted by any of the rioters if any such damages or injuries were inflicted." (Tr. 130-131)

(Tr. 133-134)[26]. Taking into account the possibility that the jury might find there was no conspiracy, it requested

---

[26] The requested instruction provided:

"In the assessment of damages against the various defendants, you should consider the date as of which the defendant or defendants commenced the activities herein complained of, bearing in mind plaintiff's claim that its damages were sustained during a period commencing September 26, 1949. Accordingly, if you find from a preponderance of the evidence that each of the defendants, as a result of a conspiracy, engaged in the activities herein complained of and that plaintiff's losses, if any, commenced as of September 28, 1949, then each of the defendants would be liable for all of the damages, if any, sustained on and after that date regardless of whether he or they participated in the unlawful activities subsequent to that date. On the other hand, if you find from a preponderance of the evidence that there was no conspiracy, then the defendants may only be held liable for such damages, if any, that plaintiff sustained as a result of the activities of such defendant or defendants, bearing in mind the instruction which I have given you as to responsibility for the damages resulting from the riot, if any.

I further instruct you that the plaintiff Hawaiian Pineapple Company can make only one recovery of the damages, if any, awarded to it in this action, and that if you should find for the plaintiff against some of the defendants in one sum and against others of the defendants for another sum, the plaintiff would be only entitled to recover the larger sum awarded, and is not entitled to recover the total of the different sums awarded." (Tr. 133-134)

that the jury be instructed that the "defendants may only be held liable for such damages, if any, that plaintiff sustained as a result of the activities of such defendant or defendants, bearing in mind the instruction which I have given you as to responsibility for damages resulting from the riot, if any". This proposed instruction also requested the jury to take into consideration in the assessment of damages the date as of which the defendant or defendants commenced the activities complained of by Hapco. Since different sets of damages might be awarded against the unions and the individuals in the event no conspiracy were found, the proposed instruction provided that, if this occurred, Hapco could only make one recovery of the larger sum awarded.

After hearing the Court's instructions with respect to the liability of the individual appellees, Hapco excepted to the instructions that the individuals could not be liable unless the unions were also found liable and to the failure of the Court to instruct that Hapco could recover against the individuals and/or the unions on a common law theory because of the physical activities they engaged in which prevented Hapco from carrying on its business (Tr. 1450).

E. Prejudicial Error in Failing to Submit Separately the Issue of Appellees' Common Law Liability.

The trial court has a mandatory duty of submitting to the jury every material issue of fact raised by the pleadings and supported by substantial evidence. 53 Am. Jur., Trial, Sec. 172, p. 149; Best v. District of Columbia, 291 U.S. 411, 415 (1934). Failure to submit such an issue for the jury's consideration is error. Marande v. Texas & Pacific Railway Co., 184 U.S. 173 (1902); Callen v. Pennsylvania Railroad Co., 332 U.S. 625 (1948). In effect such a failure to submit an issue constitutes the direction of a verdict against the aggrieved party on that issue, but a verdict may only be directed if there is a mere scintilla of evidence or none at all (see Barron & Holzhoff, Federal Practice & Procedure, (Rules Ed.) Vol. 2, Sec. 1075). This is hardly the state of the evidence with respect to the individual appellees.

The Pre-Trial Order posed the issue of the liability, if any, of the individual appellees for alleged unlawful acts resulting in damage to Hapco's business and property, regardless of whether or not these alleged unlawful acts were performed pursuant to an alleged conspiracy. Hapco submitted substantial evidence concerning the activities of the various appellees and the damages they had caused it. Under this state of the record, Hapco was entitled to have submitted to the jury the issue of whether the appellees,

or any of them, were guilty of tortious acts resulting in damage to the plaintiff, regardless of whether or not the allegations of conspiracy were sustained. It is fundamental that, even though Hapco failed in its proof of a conspiracy, it was entitled to recover damages against such of the appellees as were shown to be guilty of tortious conduct resulting in damages to it.

The prejudice that resulted to Hapco from the failure of the District Court to submit the issue of the liability of the appellees, regardless of any alleged conspiracy, is clear. Hapco was deprived of the opportunity of having the jury pass upon the simplest and best case Hapco had against the individual appellees, namely, whether the appellees, or any of them, engaged in unlawful acts against Hapco which resulted in damage to it.

II.

PREJUDICIAL ERROR TO HAPCO RESULTED FROM THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY AS TO THE LIABILITY OF THE INDIVIDUAL APPELLEES.

After instructing the jury at length on the liability of International and Local 8 to Hapco under the provisions of the Act (Tr. 1418-1435), the District Court then turned

to consider the liability of the individual appellees and instructed in substance:

(1) That if neither International nor Local 8 were found liable (under the instructions previously given dealing with their liability under the Act), a verdict should be immediately returned in favor of the individual appellees (Tr. 1435, 1440);

(2) That only if one or both of the unions were found liable under the Act, could the jury consider the liability of the individual appellees (Tr. 1435, 1440);

(3) That an individual appellee could only be found liable if he was a member of a conspiracy between either or both of the unions and the individual appellees (Tr. 1436-1437, 1438, 1440);

(4) That the conspiracy of which the individual appellees had to be a member was one to restrain commerce between Hawaii and any state, and to encourage or induce the employees of any employer by concerted action in the course of their employment to refuse to transport, handle or work upon the cargo of pineapple at The Dalles, Oregon, or to perform any services in connection therewith, with the object of forcing any employer or other person to cease doing business with any other person, and with the purpose of doing injury

to the business or property of Hapco (Tr. 1436-1437, 1439-1440).

A. Error in Instructing that Verdict Against Individual Appellees Dependent upon Verdict Against One or Both of the Unions Under the Act.

The liability of the individual appellees was not dependent upon the liability of the two labor organizations. Neither the issues framed in the Pre-Trial Order nor any requirements of law demanded such dependency.

In its contentions in the Pre-Trial Order, Hapco filed one general claim for relief based upon the total set of occurrences between it, the unions, and the individual appellees. Hapco predicated its claim for relief on the theory that the damages it sustained resulted from a violation of Sec. 303 (a) (1) of the Act by the two unions and from various unlawful acts under the common law by the unions and the individual appellees, it being alleged in both instances that the activities involved were performed pursuant to a conspiracy.

The liability of International and Local 8 depends upon whether their activities constituted a violation of Sec. 303

(a) (1) of the Act[27]. The liability of the individual appellees, as submitted by Hapco at the conclusion of the trial, depends upon whether any of them had participated in the riotous acts of September 28 against Hapco resulting in damage to it. Hapco's right of action for such unlawful acts was in no way dependent for its existence upon whether or not Hapco was able to establish liability against either or both of the unions by satisfying the statutory requirements of Sec. 303 (a) (1) of the Act.

Nor were there any contentions in the Pre-Trial Order or issues framed therein which in any way required Hapco to make a recovery against either or both of the unions under the Act before it could make a recovery against the individual appellees. On the contrary, under the issues posed in the present action and under the law applicable thereto, the jury could have brought in a verdict against one or more of the appellees even though they did not bring in a verdict against either or both of the unions.

The error of the Court in instructing that the jury could only consider the liability of the individual appellees if one or both of the unions was found liable under the Act,

---

[27] The various statutory elements necessary for a violation of Sec. 303 (a) (1) of the Act will be discussed in detail in connection with the appeal of International and Local 8 from the judgment entered against them.

was pointed out by Hapco when it took exception thereto, on the ground that the action against the individuals was "to just physically stop a business operation in connection with the riot and other activities that they engaged in" and that the jury could bring in a verdict against the individuals even though they did not bring one in against the unions (Tr. 1450).

B. Error in Instructing that Liability of Appellees Dependent upon being Co-conspirators with Either or Both Unions.

Not only did the District Court require the jury to find liability against either or both of the unions under the Act before even considering the liability of the individual appellees, but it also required that their liability be dependent upon their having further entered into a conspiracy with either or both of the unions to restrain trade between Hawaii and any state and to, in effect, violate the provisions of Sec. 303 (a) (1) of the Act.

In so instructing, we submit that the Court erred in two respects: (1) in requiring that a conspiracy be found; and (2) in stating the elements of the conspiracy.

As previously pointed out, it is not essential that a plaintiff who pleads that certain unlawful acts were committed

pursuant to a conspiracy actually prove the conspiracy. Such a charge is not the gravamen of any complaint and was certainly not the material part of Hapco's common law action against the individual appellees and the unions. The authorities are clear that, even though no conspiracy is proven, Hapco may recover damages against such of the appellees as are shown to have committed unlawful acts directly resulting in damage to it.

Secondly, in respect to the nature and elements of the conspiracy which the Court required the jury to find between the unions and the individual appellees before a verdict could be rendered against any of the latter, the District Court itself recognized in its opinion denying the motions for new trials that it "placed a somewhat greater burden upon Pineapple as to these individuals." (Tr. 164-165). The District Court also recognized that it "may not have accurately stated the elements of liability at common law as to the individuals" but disposed of any shortcomings in this respect by stating that no exceptions were taken by Hapco to the instructions upon this ground (Tr. 165).

In stating the elements necessary to be found by the jury in order for it to find liability against the individual appellees, the District Court almost completely followed the requirementts of Sec. 303 (a) (1) of the Act. The action of the District Court in this respect is puzzling, for Sec. 303 (a) (1) of the Act relates to prohibited conduct by labor

organizations and the District Court itself held that an action could not be maintained against the individual appellees under the Act (Tr. 164).

Although Hapco cast its conspiracy charge generally in terms of the language of Sec. 303 (a) (1) of the Act (Tr. 57-58), its broad allegations in this respect were thereafter circumscribed and limited by a specification of the various unlawful acts allegedly committed by all of the parties defendant. Moreover, in light of the proof adduced at the trial as to the acts which directly caused all of Hapco's claimed damage, Hapco was not restricted to relying on the tort of interfering with and obstructing the transportation of goods between a territory and the states or from one state to another[28]. Instead, insofar as its common law ground was concerned, Hapco desired to submit it to the jury, in part, on the basis of the activities of the individual appellees in rioting upon the dock of the Port on September 28 and the consequent damage to Hapco resulting there-

---

[28] Thus, the District Court stated in its opinion:

"Interference with transportation of goods between a territory and states or from one state to another is a direct burden upon and obstruction of interstate commerce. If such an obstruction occurs, it is illegal", citing, Waterfront Employees of Portland, et al, v. CIO, 1 CCH Lab. Cas. 386; M & M Wood Working Co. v. Plywood & Veneer Workers Local, etc., 1 CCH Lab. Cas. 389. (Tr. 186)

from (Tr. 130-131). The propriety of submitting it on this basis and the elements of liability involved have already been considered.

When the Court failed and refused to give instructions to this effect or in any way to follow the theory upon which they were based, but instead gave its instructions predicating the common law liability of the individuals upon the standards in Sec. 303 of the Act, Hapco took specific exception to the failure of the District Court to instruct that Hapco could, in effect, only recover against the individuals and/or the unions under the Act. Hapco contended that it was entitled to recover, even if no Taft-Hartley action was involved by reason of the physical activity which had been engaged in to prevent Hapco from carrying on its business (Tr. 1450-1451).

C. Prejudice to Hapco from Erroneous Instructions.

Best evidence of the prejudice that resulted to Hapco from the District Court's erroneous instructions is in the verdict of the jury against International and Local 8 but in favor of the individual appellees.

The District Court itself admitted that it had placed a "somewhat greater burden upon Pineapple [Hapco] with respect to establishing the liability of individuals" (Tr.

164-165). Can there be any doubt of this "greater burden" and of the prejudice which resulted to Hapco when the District Court required it to establish by a preponderance of evidence three principal conditions before the jury could find any individual appellee liable: (1) a violation of Sec. 303 (a) (1) of the Act by the unions, or either of them; (2) a conspiracy between the unions, or either of them, and the individual appellees; and (3) the restraining of trade between Hawaii and any state and the engaging in the prohibited activities under Sec. 303 (a) (1) of the Act.

We submit that each and every one of these three conditions precedent to the liability of an individual appellee was unwarranted. Each one materially burdened the task of Hapco in establishing the liability of any of the appellees. To prove, for example, that certain unlawful acts resulted in damage is one matter; to prove that the same acts were committed pursuant to a conspiracy, as required in the District Court's instructions, is far more difficult. All three of the conditions precedent to individual liability enunciated by the District Court taken together evidently proved to be too difficult a burden for Hapco to meet.

III.

HAPCO IS ENTITLED TO A PARTIAL NEW TRIAL ON THE SEPARABLE ISSUE OF THE COMMON LAW LIABILITY OF THE INDIVIDUAL APPELLEES WHICH WAS NOT SUBMITTED TO THE JURY.

Upon the trial of this action, the jury returned a verdict in favor of Hapco and against the two unions, but it found in favor of the individual appellees. However, the District Court failed to submit to the jury the issue of the liability of the individual appellees for their riotous activities on September 28. Instead, the Court only submitted to the jury the issue of whether the individual appellees were co-conspirators with the unions in their violations of the Act. On this appeal, Hapco seeks a partial new trial of the liability of the appellees for their tortious conduct leading up to, and culminating in, the riot staged against Hapco upon the dock of the Port of The Dalles on September 28.

A. Power of the Court to Remand for a Partial New Trial.

The power of this Court to order a new trial as to separable parties or separable issues, or both, where prejudice to the parties does not result, is unquestioned by modern authority. Atkinson v. Dixie Greyhound, 143 F. (2d) 477 (CA 5, 1944), cert. denied, 323 U.S. 758; Thomp-

son v. Camp, 167 F. (2d) 755 (CA 6, 1948) cert. denied, 335 U. S. 824: see Commentary, 3 Fed. Rules Service, p. 729, Sec. 59a. 22.

The purpose of this rule is to prevent unnecessary relitigation of issues and of the liability of parties and to limit new trials to those issues which were incorrectly decided, or not decided at all. Yates v. Dann, 11 F.R.D. 386 (D.C. Del., 1951); see, Annotation, 143 A.L.R. 7, at 14-15.

B. The Issues and Parties herein Involved are Separable for the Purpose of a New Trial.

There can be no doubt that an action could have been maintained by Hapoo against only the appellees for their tortious acts under the common law. The fact that the unions and the individual appellees were sued in one action and linked together by allegations of a conspiracy does not intertwine them with respect to their respective legal liability. A new trial as to the individual appellees would result in exactly the same situation which would have existed had suit originally been brought against them alone.

Moreover, the issue of appellees' liability for their riotous conduct is distinct and separable from more complex questions of their liability as co-conspirators with the unions in tortious conduct for which the latter might be liable. Not only is it simpler, but it requires less proof as

well as different proof than the conspiracy case against the unions and the individuals. Under it the jury need only have presented to it the question of whether the appellees went upon the dock and injured Hapco's property.

In the District Court's own words, a "greater burden" was placed upon Hapco with respect to proving the liability of the individuals (Tr. 164-165). In so doing, even the District Court recognized a distinction between the issue of the unions' liability under Sec. 303 (a) (1) of the Act and the issue of the individuals' liability as conspirators with the unions. Still more distinct is the issue of the liability of the appellees for their common law tortious acts which Hapco sought unsuccessfully to have submitted to and determined by the jury.

Accordingly, we submit that the individual appellees are separable from the unions in this case for the purpose of a partial new trial and that their common law liability is a separable issue from that involving an alleged violation of the Act and any conspiracy related thereto.

A new trial on the separable issue of the liability of the appellees cannot be deemed prejudicial to them because this issue was not submitted to the jury for decision. Having thus never had their common law liability separately presented, the appellees are in no position to complain that a new trial limited as to them and their liability is prejudicial to them. The appellees were always subject to an action

directed against them alone. A partial new trial without the presence of the two unions as defendants would, in fact, appear to favor rather than prejudice the appellees for they would not be confronted with evidence bearing upon the violation of the Act by the unions.

CONCLUSION

Under the jury's verdict in this case, not one of the appellees was found to be liable, despite clear and unrebutted evidence that at least sixty of them unlawfully went upon the dock of the Port of The Dalles and there rioted against Hapco, injuring its employees and damaging its property and business. The jury's verdict in this respect is a true miscarriage of justice, under which violence has been sanctioned and individuals have been allowed to escape liability for their unlawful acts.

We submit that the verdict resulted from the failure of the District Court to allow the jury to separately pass upon the liability of the individual appellees for their riotous activities and was further due to errors committed by the District Court in the actual instructions it gave to the jury with respect to the liability of the appellees.

Accordingly, we respectfully submit that Hapco should be granted a partial new trial against the appellees on the

limited issue of their liability under the common law for the damages which their tortious acts inflicted on Hapco.

Respectfully submitted,

KRAUSE & EVANS
GUNTHER F. KRAUSE
DENNIS LINDSAY
GERALD H. ROBINSON
Attorneys for Appellant
Hawaiian Pineapple Company, Ltd.